

Approved For Release 2002/08/28 : CIA-RDP92-00455R000100130008-3

OGC 80-01859
5 March 1980MEMORANDUM FOR: Director of Personnel Policy, Planning
and Management

STAT ATTENTION:

FROM:

Office of General Counsel

SUBJECT: Executive Committee Agenda Item:
Agency Overtime PolicyREFERENCES: Memo to D/PPP&M from [redacted]
dated 14 January 1980, same subjectATTACHMENT
OGC OPINION
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1. Referenced memorandum has asked for an updated opinion from the Office of General Counsel regarding the legality of the Agency's establishment of an overtime pay system without regard to the provisions of the Federal Employees Pay Act of 1945, as amended. In a 1974 memorandum, [redacted] of this Office discussed the evolution of the Agency's policies with respect to overtime pay, analyzed prior OGC opinions addressing the legality of the policies, and concluded that the Agency is not, as a matter of law, required to follow the pertinent provisions of the Federal Employees Pay Act of 1945. OGC 74-2338, dated 12 December 1974. After a review of that material, pertinent statutes, and legislative history, I am of the opinion that sufficient authority exists to support the conclusions of that memorandum, for the reasons set forth below.

2. The provisions of law generally governing government-wide overtime pay are derived from the Federal Employees Pay Act of 1945, as amended, at 5 U.S.C. §5542. That section prescribes premium, or overtime, pay for certain hours of work officially ordered or approved and is generally applicable to employees of executive agencies pursuant to 5 U.S.C. §5541. Notwithstanding the general applicability of these provisions, the law itself suggests, and the legislative history supports this, that it applies only to classified employees; that is, those subject to the Classification Act of 1949, as amended.))

ALL PORTIONS ARE UNCLASSIFIED

3. Title II of the Federal Employees Pay Act of 1945 (Pay Act) established for "officers and employees to whom this title applies" an overtime hourly rate of one and one-half times the basic hourly rate of compensation for employees "whose basic compensation is at a rate less than \$2,980 per annum." The Pay Act also established an overtime rate for employees paid at a higher annual rate in accordance with a designated pay schedule ranging from \$2,980 to over \$6,440. This provision was amended in 1954, however, to suggest if not explicitly provide that "the employees to whom this title applies" are those subject to the Classification Act of 1949. In the 1954 amendments, the schedule for overtime payments was geared, not to annual rates, but to GS levels, as follows:

(1) For each officer and employee whose basic compensation is at a rate which does not exceed the minimum scheduled rate of basic compensation provided for grade GS-9 in the classification Act of 1949, as amended, the over time hourly rate of compensation shall be an amount equal to one and one-half times the hourly rate....68 Stat. 1109.

Similarly, overtime compensation was established for officers and employees whose pay was at a rate exceeding "GS-9 in the Classification Act of 1949, as amended." Accordingly, the standard for overtime payments to be made government-wide seems to have shifted to employees paid under the Classification Act, unless it may be argued that persons receiving compensation at a rate equivalent to certain GS levels, were intended to be covered. Subsequent amendments, however, suggest that only classified employees are subject to the Pay Act.

4. Amendments in 1966 adjusted the rates of compensation for certain federal employees. In particular, they effected a "reduction in overtime pay for certain classified employees" (Emphasis added).

Section 404 authorizes overtime payment for work in excess of 8 hours in one day for classified employees with the exception of certain engineering and scientific employees. Federal employees get overtime pay for work in excess of 40 hours in a week, but heretofore the law has not required pay for work in excess of 8 hours in a day. (Emphasis added). P.L. 89-554, Sept. 6, 1966, 80 Stat. 485.

In 1967, the legislative history to amendments for travel time and overtime pay, enacted to exhort agencies to schedule travel during the regular work hours, also referred to employees "in the classified service." 2 U.S. Cong. & Adm. News 1967, p. 2287.

5. In 1971, the intent of Congress lost all its subtlety when it further amended the pay Act to provide for overtime pay for intermittent and part-time employees. The legislative history provides:

The purpose of this legislation is to provide overtime pay for intermittent and part-time general schedule employees who work in excess of 40 hours a week. This legislation will place these employees on the same basis with respect to premium pay for overtime work as wage board and full-time classified employees.

* * *

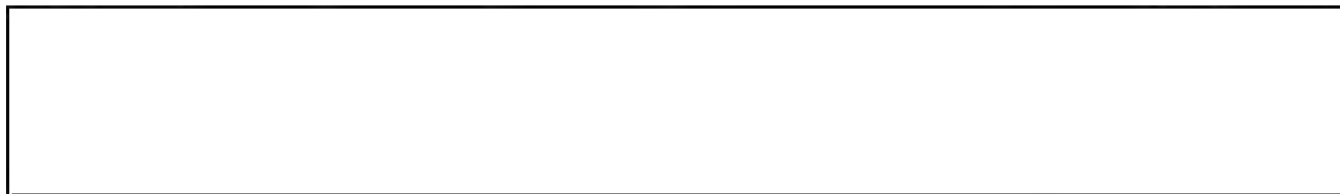
The legislation will extend overtime benefits to part-time and intermittent employees of the same classes of employees covered by the existing provisions of section 5542. The classes of employees are defined by section 5541 of title 5, and, generally speaking, cover employees who are subject to the General Schedule....
(Emphasis added).*

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While there may continue to be lingering doubt about the Act's scope, I believe the better view is that because CIA is expressly excluded from the general schedule provisions of the Classification Act, CIA is not subject to the Pay Act,

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7. In conclusion, this Office is in full agreement with [redacted] conclusion that the Agency may establish overtime pay policies without regard to the Federal Employees Pay Act of 1945. The Act itself applies to employees paid under the General Schedule, CIA is exempted from that schedule, and the CIA Act authorizes CIA to establish a personnel system notwithstanding any other provisions of law for purposes necessary to carry out its functions. Thus, based on the foregoing analysis, I believe the eight-hour "donation rule" may be deemed lawful as a valid CIA personnel practice. While there is a reasonable argument to be made that CIA is subject to the premium pay provisions of the Pay Act, I would not suggest a complete overhaul of our policies based upon a fear that a court could find CIA subject to those provisions. Nevertheless, it must be understood that existing policy could be overturned if found to be arbitrary or capricious. Accordingly, a renewed determination to continue this donation rule should be accompanied by an articulable rationale that goes beyond, for example, a mere desire to save money. Absent an articulable rationale, the likelihood of success in litigation attacking the validity of this rule--which on its face might seem more arbitrary than a policy that, for example, provides no overtime whatsoever but pays, instead, higher basic salaries as does the FBI's system--would be speculative. I would be available to assist in examining both possible alternative systems and appropriate justification for the existing rule at your convenience in order to strengthen the Agency's defense posture in the event of litigation.



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Overtime Policy

I. TOPIC.

Staff Study on the Agency's Overtime Policy.

II. BACKGROUND.

A. The development of the Agency's eight-hour overtime donation rule is traceable to April 1958 when the Director of Personnel asked the General Counsel to determine the legality of certain changes in the Agency's overtime policy. In January 1959, the OGC responded that the Agency was not subject to the overtime provisions of the Federal Employees Pay Act of 1945 and could require employees at certain grade levels to donate the first eight hours of overtime work. This opinion noted that the draft of the proposed overtime regulation covering the donation feature was discussed with the General Counsel of the Comptroller General and his staff who were of the opinion that "there was no legal objection to the adoption of the proposal." The 1959 determination has been supported by subsequent OGC opinions in December 1964 and December 1974. Concern, however, has been consistently expressed whether or not the courts would sustain this view should an employee go to litigation on the matter. The most recent (5 March 1980) OGC review of this matter continues to support the 1959 ruling but notes that the determination to continue the policy should be "accompanied by an articulable rationale."

B. In 1969, an inter-Directorate committee reviewed the policy and recommended the elimination of the eight-hour rule, with adherence to standard U.S. Government overtime laws and regulations. The committee's proposal was not adopted; however, Agency management has continued to study the policy periodically. The most recent study occurred in 1977, when the EAG briefly examined the eight-hour donation rule in connection with a survey of certain administrative differences between DIA and CIA. Although the Director of Personnel recommended at that time that the Agency should change its overtime policy and "compensate all grades eligible by statute for work performed," the EAG declined to do so and revalidated the donation policy.

ATTACHMENT
STAFF STUDY

III. DISCUSSION.

A. The current overtime policy has been in effect for about twenty years. The fact that it has survived so long is evidence of its efficacy but the frequent review to which it has been subjected may be equally indicative of concern over its equity. Of the rationales advanced for its creation, the one connecting the "donation" with the concept of professional work levels and attitudes was the most significant. The basis for this position was stated in the 1962 regulation which published the donation rule and the following rationale:

(1) These positions require executive and professional skills and attributes which cannot be evaluated accurately on the basis of number of hours worked.

(2) The aptitudes and work habits of such individuals vary and should not be circumscribed by prescribed maximum work hours.

(3) These positions may require duty at several places and at irregular times of the day and involve duties of such nature that the need for and duration of the duty periods can be determined only by the individual.

While the Agency adopted this philosophy, it has created an apparent inconsistency by permitting overtime earnings after the eight-hour donation. This eligibility for overtime compensation beyond eight hours is illogical if the foregoing concept of "professionalism" is viewed as being incompatible with the payment of overtime.

B. In summary, the principal pros and cons of the current policy are:

1. Pros

- (a) Recognizes concept of professionalism,
- (b) Controls abuse of overtime,
- (c) Encourages better management by the employee of his/her workload,
- (d) Recognizes the unique working conditions of Agency employment.

2. Cons

(a) Viewed by some employees as discriminatory vis a vis policies of other government agencies,

(b) Reluctance of some employees to work more than a forty-hour week,

(c) Possibility that litigation might successfully attack the policy.

IV. CONCLUSION.

This overtime policy overall has served the Agency well but may need modification. The concept of professionalism on which the policy is principally based would be strengthened if all overtime payment to employees in grades GS-12* and above was eliminated.

V. RECOMMENDATION.

It is recommended that Agency overtime policy be altered to eliminate any payment of overtime to employees in grades of GS-12 and above except, as presently provides, such overtime hours represent directed work:

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"(1) On a position which requires substantial amounts of overtime work on a continuing basis, and the productivity is predominately measurable in units of production or hours of duty performed. Such positions will be identified by the Operating Official or Head of Independent Office, concurred in by the appropriate Deputy Director, and approved by the Director of Personnel, or

"(2) On any day during a work period of seven or more consecutive days, or

*The cutoff grade was changed from GS-11 to GS-12 in April 1972, we assume as a result of "grade creep" and the improper inclusion of GS-11 employees who could not meet the definition of professionalism as defined by the regulation.

"(3) On a second job the duties of which are substantially unrelated to the primary assignment. Such positions will be identified by Heads of Independent Offices or by Operating Officials with the concurrence of the appropriate Deputy Director and will be approved by the Director of Personnel."

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